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SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1407

MORGAN M. FINLEY, et al.,
Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, et al.,
Appellees.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Juan Hernandez and Maria Hernandez, Appellees, ask leave to proceed in forma pauperis and to file their Motion to Dismiss or Affirm and all subsequent papers in accordance with Supreme Court Rule 53. The affidavit of the Appellees in support of this motion is attached hereto.

Fred L. Lieb

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Counsel for Appellees

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Appellees.

AFFIDAVIT IN SUPPORT OF APPELLEES' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

We, JUAN HERNANDEZ and MARIA HERNANDEZ, being first duly sworn according to law, depose and say that we are the Appellees in the above-entitled cause, and in support of our application for leave to proceed in forma pauperis, state:

1. We are married and have four children ages 7, 8, 10 and 12.

2. Affiant, JUAN HERNANDEZ, is employed as a laborer and brings home approximately $150.00 per week. Affiant, MARIA HERNANDEZ, is presently unemployed and receives $95.00 per week as unemployment compensation. We have no other source of income.

3. Because of our present financial situation, we are unable to pay the cost of printing the papers which we must file in response to those filed by the appellants.

4. The district court below found the Illinois Attachment Act unconstitutional and ordered the defendants to return our property which had been attached. We believe the court was correct and desire the opportunity to file the appropriate papers in this Court to dismiss the appeal or affirm the judgment below.

Juan Hernandez
JUAN HERNANDEZ

Maria Hernandez
MARIA HERNANDEZ

Subscribed and sworn to before me

May 3, 1976

Notary public

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Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

Appeal from the United States District Court

For the Northern District of Illinois

MOTION TO DISMISS APPEAL OF APPELLANTS FINLEY AND ELROD FOR WANT OF JURISDICTION

Appellees, Juan Hernandez and Maria Hernandez, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal of Appellants Finley and Elrod be dismissed for want of jurisdiction. In support of said motion appellees state as follows:

1. Appellants Finley and Elrod filed their Notice of Appeal in the district court on February 10, 1976.

2. Appellants failed to file a Jurisdictional Statement within sixty days of Notice of Appeal as required by Rule 13(1) of the Rules of the Supreme Court of the United States. This

Court therefore does not have jurisdiction to consider any appeal of Appellants Finley and Elrod. Shapiro v. Doe, 396 U.S. 488 (1970); Pittsburgh Tow Co. v. Mississippi Barge Line, 385 U.S. 32 (1966).

WHEREFORE, Appellees respectfully request this Court to dismiss the appeal of Appellants Finley and Elrod for want of jurisdiction.

Respectfully submitted,

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Appellees.

Appeal from the United States District Court

for the Northern District of Illinois

MOTION TO DISMISS APPEAL OF APPELLANTS TRAINOR AND O'MALLEY OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT BELOW

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v.

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Appellees.

Appeal from the United States District Court

for the Northern District of Illinois

MOTION TO DISMISS APPEAL OF APPELLANTS TRAINOR AND O'MALLEY OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT BELOW

Appellees, Juan Hernandez and Maria Hernandez, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal of Appellants Trainor and O'Malley be dismissed, or, in the alternative, that the judgment of the district court be affirmed on the grounds that the questions presented are so unsubstantial as not to warrant further consideration.

STATEMENT OF THE CASE

Appellees adopt Appellants' statement of the case except for their assertion that temporary relief was denied by the district court. (Appellants' Jurisdictional Statement at 6.) The court below never ruled on plaintiffs' motion for a temporary restraining order, but instead persuaded the defendants to release one-half of the attached funds to the plaintiffs pending the outcome of the lawsuit.

ARGUMENT

I

THE APPEAL OF APPELLANTS TRAINOR AND O'MALLEY PRESENTS NO CASE OR CONTROVERSY WHICH CAN BE RESOLVED BY THIS COURT AND SHOULD THEREFORE BE DISMISSED.

Notice of Appeal to the United States Supreme Court was filed in the district court by defendants Trainor and O'Malley on February 3, 1976 and by defendants Finley and Elrod on February 10, 1976. Finley and Elrod, however, failed to submit a jurisdictional statement within sixty days of their Notice of Appeal as required by Rule 13(1) of the Rules of the Supreme Court of the United States. Accordingly Appellees have filed with this court a motion to dismiss the appeal of Finley and Elrod for want of jurisdiction. See, Shapiro v. Doe, 396 U.S. 488 (1970); Pittsburgh Tow Co. v. Mississippi Barge Line, 385 U.S. 32 (1966). The only appeal before this court is therefore that of Trainor and O'Malley. Appellees contend that absent an appeal by Finley and Elrod, the appeal of Trainor and O'Malley presents no live case or controversy which can be resolved by this court.

The district court entered the following injunctions against the defendants:

...

2. Defendants Finley and Elrod are ordered to cause release of all property of plaintiffs Juan and Maria Hernandez attached pursuant to writ of attachment.

3. Defendant Finley and all other clerks for the

judicial circuits of Illinois, their successors, agents and employees are hereby enjoined from issuing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

4. Defendant Elrod and all other county sheriffs of the State of Illinois, their successors, agents and employees are hereby enjoined from executing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

5. Defendants Trainor and O'Malley are hereby enjoined from authorizing and processing applications for writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth.

6. Defendants Finley and Elrod, all other clerks of the judicial circuits of Illinois, and all other county sheriffs of Illinois, are ordered to cause release of any property currently attached pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth, and give notice of such release to all persons whose property is the object of such attachments.

...

(Order of December 15, 1975, Appendix A, Appellants' Jurisdictional Statement)

Defendants Trainor and O'Malley purport to appeal the entire order of December 15, 1975, including those portions of the order directed solely against defendants Finley and Elrod and the classes they represent. It is settled law, however, that a party may only appeal a judgment directed against him even though he is injured economically by the judgment. Stearns-Roger Mfg. Co. v. Brown, 114 F. 939 (8th Cir. 1902); Spriggs v. Stone, 174 F.2d 671 (D.C. Cir. 1949); Milgram v. Loew's Inc., 192 F.2d 579 (3rd Cir.) cert. denied, 343 U.S. 929 (1951); Seaboard Surety Co. v. United States, 306 F.2d 855 (9th Cir. 1962). Since Finley and Elrod have chosen not to perfect an appeal of the injunctions against them, those injunctions are not before this court and may not be raised on the appeal of Trainor and O'Malley. Swarb v. Lennox, 405 U.S. 191, 201 (1972); Strunk v. United States, 412 U.S. 434, 437 (1972). Therefore the injunctions against Finley and Elrod remain in full force and effect regardless of the outcome of the Trainor and O'Malley appeal.

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The only judgment entered by the district court against Trainor and O'Malley is an injunction enjoining them from authorizing and processing applications for writs of attachment pursuant to certain sections of the Act. Even if Trainor and O'Malley were to prevail on an appeal of this injunction, they could still not obtain pre-judgment attachments since all clerks and sheriffs of Illinois are enjoined from issuing and executing writs of attachment pursuant to those sections of the Act. Thus, there is no effective relief which the Court can give to Trainor and O'Malley. When the controlling issues in a case become moot and the remaining issues are insufficient in the context of the case to save it from mootness, the appellate court should refuse to take the case for review. 6A Moore's Federal Practice ¶57.13 at 57-124. See, Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972). Similarly, when, as here, the controlling issues in the case are no longer justiciable because they have not been timely appealed, and the remaining issue is insignificant in the context of the entire case since appellants cannot be given any effective relief, this Court should not exercise its jurisdiction. This appeal should therefore be dismissed for want of a case or controversy between the parties before the Court.[1/]

II

THIS APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Appellants premise their jurisdiction on 28 U.S.C. §1253, which provides, in pertinent part, for "...appeal to the Supreme Court from an order granting...a permanent injunction in any civil suit or proceeding required by any Act of Congress to

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1/ Plaintiffs' claim for damages against defendants has not yet been adjudicated because of the pendency of the appeal. The issue of damages is therefore not yet ripe and cannot satisfy the case or controversy requirement.

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be heard and determined by a district court of three judges." (emphasis added). Therefore if the convening of a three-judge court was not required, then this court lacks jurisdiction. Pennsylvania Pub. Util. Comm'n v. Pennsylvania, 382 U.S. 281 (1965); Bailey v. Patterson, 369 U.S. 31 (1962).

A. The Injunction Entered By The District Court Against Appellants Trainor And O'Malley Did Not Require The Convening Of A Three-Judge Court And Therefore Is Not Directly Appealable To The Supreme Court Pursuant To 28 U.S.C. §1253.

28 U.S.C. §2281 requires the convening of a three-judge court only upon the request for an "...injunction restraining the enforcement, operation, or execution of any State statute by restraining the action of any officer of such State in the enforcement, or execution of such statute..." A three-judge court was convened here because plaintiffs requested an injunction enjoining the Clerk of the Circuit Court of Cook County (Finley) and the Sheriff of Cook County (Elrod) from enforcing and executing the Illinois Attachment Act. The three-judge court granted plaintiffs the injunctive relief requested against these officers. Order of December 15, 1975, Appendix A, Appellants' Jurisdictional Statement.

A three-judge court, however, was not required to hear plaintiffs' request for an injunction against defendants Trainor and O'Malley since these defendants are not state officers within the meaning of 28 U.S.C. §2281. See, Moody v. Flowers, 387 U.S. 97 (1967). Trainor and O'Malley are not charged with execution or enforcement of the Illinois Act, but merely utilized the Act in the capacity of private creditors.[2/] While the claim against these defendants was heard by the three-judge court under its pendent jurisdiction, direct appeal to this Court of only the pendent claim is improper since it has no independent

2/ Appellants' suggestion on pages 8-9 and 12 of their Jurisdictional Statement that they, as state officials, enjoy some special constitutional considerations in employing a statute designed for general creditor use is clearly without merit. As the three-judge court noted in its decision, "...it is mere happenstance that the State of Illinois was the petitioner..." In employing the statute in the position of a private party, Trainor and O'Malley are appealing in the same capacity here.

jurisdictional base. Pittsburg and W.Va. Railway Co. v. U.S., 281 U.S. 470 (1929); Perez v. Ledesma, 401 U.S. 82, 86-87 (1971).

Nor does this court have jurisdiction of this appeal because of the injunctions entered by the three-judge court against Finley and Elrod. As noted above (Argument I, supra), Finley and Elrod chose not to appeal those injunctions. Absent such an appeal, the case before this court is in the same posture as if an injunction had been secured solely against Trainor and O'Malley. Since that injunction was not required to be heard by a three-judge court, this Court does not have jurisdiction pursuant to 28 U.S.C. §1253.

B. A Three-Judge Court Was Not Required To Hear This Lawsuit Since The Illinois Attachment Act Was Found To Be Patently And Flagrantly Unconstitutional And Therefore It Is Not Directly Appealable Pursuant To 28 U.S.C. §1253.

Dismissal of the appeal is further dictated by this Court's decision in Bailey v. Patterson, supra. In Bailey a three-judge court was convened to hear a constitutional challenge to a state statute requiring racial segregation on common carriers. The district court abstained and the plaintiffs took a direct appeal to this Court pursuant to 28 U.S.C. §1253. This Court, after noting that the constitutional issue had been settled beyond question, stated that "three-judges are...not required when, as here, prior decisions make friviolous any claim that a state statute on its face is not unconstitutional." 369 U.S. at 33. Since the case was therefore not one "required...to be heard and determined by a district court of three judges," it could not be appealed pursuant to 28 U.S.C. §1253. Id. at 34.[3/]

In the instant case a three-judge court found the Illinois Attachment Act to be "patently and flagrantly violative of the Constitution," 405 F. Supp. at 762 and "on its face

3/ See also, Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 97, n.14 (1974), in which the Court analyzed generally its narrow construction of the Three-Judge Court Act and stated that it had previously "...held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent, Bailey v. Patterson, supra..."

patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." Id. at 762. This decision was reached after review of prior decisions of this Court which set forth the due process requirements for summary creditor statutes such as the Illinois Act. See, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem Inc., 419 U.S. 601 (1975). While this decision was rendered after the three-judge court had already been convened, the court clearly could have dissolved itself under Bailey and remanded the case to a single judge. When, as here, a three-judge court decides a case on grounds "which would have justified dissolution of the court...or a refusal to request the convention of a three-judge court ab initio, review...is available in the Court of Appeals." Gonzalez v. Automatic Employees Credit Union, 419 U.S. at 101. Thus, this Court does not have jurisdiction of this appeal.

With increasing frequency, due in part to the staggering workload of the federal judiciary, single judges are holding statutes unconstitutional without convening three-judge courts when the statutes are found to be patently unconstitutional. See, e.g., Anderson v. Nemetz, 474 F.2d 814 (9th Cir. 1973); Aiona v. Pai, 516 F.2d 892 (9th Cir. 1975); Hank v. Fenner, 396 F. Supp. 1 (D.S.D. 1975). As the court noted in Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129, 131 n.1 (2nd Cir.) cert. denied, 389 U.S. 839 (1967), "...Congress could not have intended to require three judges to be assembled when the decision could not possibly go in any manner save one."

A district court decision in Texas illustrates the appropriateness of a single judge rendering a decision on a statute raising similar constitutional questions as the Illiinois

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Attachment Act.[4/] In Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974), the Court struck down the Texas sequestration statute holding that the statute's clearly unconstitutional failure to comply with prior notice and hearing requirements of Fuentes v. Shevin, supra, and failure to meet the standards of Mitchell v. W.T. Grant Co., supra, obviated the necessity for a three-judge court. With this Court's recent affirmation of Fuentes and Mitchell in North Georgia, the propriety of a single judge striking down statutes such as the Texas and Illinois Acts is even more apparent.

For the foregoing reasons Appellees submit that the case against Appellants Trainor and O'Malley was not one required to be heard by a three-judge court and therefore direct appeal does not lie to this Court pursuant to 28 U.S.C. §1253.

III

IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED ON THE GROUNDS THAT THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER CONSIDERATION.

A. The Illinois Attachment Act Is Patently Violative Of The Due Process Clause Of The Fourteenth Amendment.

The district court found the Illinois Attachment Act to be on its face patently violative of the due process clause of the Fourteenth Amendment. In the court's view the Act does not provide for a pre-seizure hearing as required by Fuentes v. Shevin, 407 U.S. 67 (1972), nor does it provide the alternative safeguards to protect the debtor from wrongful seizure of his property approved by this Court in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Specifically, the Court found the Illinois Act lacking three crucial safeguards which were present in the Louisiana sequestration statute upheld in Mitchell:

4/ The Texas statute is similar to the Illinois statute under attack here in that it contains the same constitutional defects: it does not require the creditor to set forth specific facts in his affidavit justifying the issuance of a writ, it provides for no judicial supervision, and it does not provide for an immediate post-seizure hearing.

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1. The Illinois Act does not require the creditor to set out specific facts in his affidavit which would entitle him to relief, but authorizes a writ to issue upon conclusory allegations in verbatim statutory language coupled with certain procedural information.

2. A creditor need not present a factual affidavit to a judge for determination of whether a writ should issue, but instead a writ will automatically issue from the clerk of the court who has no authority to determine the factual sufficiency of the affidavit.

3. The Act does not provide for an immediate post-seizure hearing, but only a hearing on application by the debtor at some uncertain time in the future to be set at the convenience of the court.

The district court's decision is clearly in line with the decisions of this Court which have set forth the due process requirements for summary creditor remedies. Sniadach v. Family Finance Corp., 397 U.S. 254 (1969); Fuentes v. Shevin, supra; Mitchell v. W.T. Grant Co., supra; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). In these cases this Court has made it patently clear that an alleged debtor must be given either prior notice and hearing or certain alternative procedural safeguards before a creditor can bring about the seizure of the debtor's property by State authorities. Extended argument is not necessary to show that the Illinois Act fails in important respects to meet the due process standards set forth by this Court. Plenary consideration is therefore not warranted and the decision of the district court should be summarily affirmed.

Notwithstanding the patent defects in the Illinois Act, appellants attempt to persuade this Court that the procedures authorized by the Illinois Act compare favorably with those upheld in Mitchell. A comparison of the Louisiana sequestration statute scrutinized in Mitchell with the Illinois Attachment Act shows that appellants' argument is without merit.

In Mitchell, a creditor with a vendor's lien in personal property purchased by the debtor on an installment contract obtained a writ of sequestration of that property pending the outcome of a trial on his contractual claim. Pursuant to the Louisiana sequestration statute the seller filed a petition and affidavit setting forth factual allegations which supported the grounds for issuance of the writ. The application was made to a judge who was required to examine the affidavit to determine whether the alleged facts constituted adequate grounds for the sequestration. The issue at this stage of the proceeding was simply whether the creditor or the debtor was entitled to possession pendente lite. Since the issue of possession turned on uncomplicated matters that were amenable to documentary proof - the existence of the debt, the lien, and the delinquency - the court reasoned that an ex parte hearing was adequate. 416 U.S. at 609. However, the time which the property was subject to ex parte seizure was cut to a bare minimum by an express statutory provision allowing the debtor to move for an immediate post-seizure hearing.

In contrast to the installment seller in Mitchell, the Illinois attachment creditor need not have or allege any current lien, mortgage, or other legally cognizable interest in the property subject to attachment. Instead the creditor has a virtually unlimited power to initiate a seizure by the sheriff of any and all goods of an alleged debtor to be held for satisfaction of a possible future judgment. Such a power gives the creditor great leverage for a favorable settlement of his claim, especially where, as in the present case of a low-income debtor, the debtor is unable to obtain a bond for the release of his property.

This extraordinary remedy is available to an alleged creditor merely by filing an affidavit with a court clerk which sets forth certain grounds for the attachment in broad

conclusory language. In the instant case the creditor obtained an attachment by filing an affidavit on a preprinted form supplied by the clerk of the circuit court which set forth in verbatim statutory language the allegation that the plaintiffs "within two years prior to the filing of this affidavit fraudulently concealed or disposed of their property so as to hinder or delay their creditors." Neither in the affidavit nor in the complaint filed therewith did the creditor set forth specific factual allegations which constitute fraud under the Illinois law.[5/] Furthermore, the creditor did not, nor was he required to, allege any facts demonstrating extraordinary circumstances necessitating any ex parte seizure. See, Fuentes v. Shevin, supra at 73.[6/] While appellants contend that attachment without prior notice is necessary to prevent a debtor from concealing his property or leaving the jurisdiction, these grounds were not alleged in their affidavit or complaint. Even when such grounds are alleged by a creditor, the Act does not require supportive facts.

Based upon the creditor's affidavit a writ of attachment was issued by a clerk of the court who had no authority to review the factual basis of the affidavit to determine whether a

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5/ In Illinois the specific factual elements of fraud must be pleaded. Tate v. Jackson, 22 Ill. App. 2d 471, 161 N.E. 2d 156 (1959); Attwood Vacuum Mach. Co. v. Continental Casualty Co., 107 Ill. App. 2d 248, 246 N.E. 2d 882 (1969).

6/ Appellants' contention that the present case is an "extraordinary situation" is without merit under Fuentes since the facts which might constitute such an extraordinary situation were never alleged in state court. Furthermore, the Act is not narrowly limited to such situations but is instead a general creditor remedy. The fact that in the present case the Act was utilized by a government agency to collect monies allegedly due the state does not render it any less defective.

writ should issue.[7/] Compare, Hutchison v. Bank of North Carolina, 392 F. Supp. 888, 896 (N.D. N.C. 1975)(three-judge court). Judicial review of the petititon for the writ is especially crucial in this case since the grounds set forth in the Illinois Act are made up of numerous subjective elements, such as intent and scienter, which are not amenable to documentary proof. See, Mitchell v. W.T. Grant Co., supra at 617. Nor does the debtor have the right to a judicial hearing immediately after the seizure. If the debtor answers the creditor's affidavit under §27 of the Act he may get a hearing on the attachment issue on the return date (ten to sixty days after the date of the writ) or at some later date set at the convenience of the court.[8/] However, there is no express provision in the Act whereby the creditor can move for an immediate post-seizure hearing and thereby cut to a bare minimum the length of the ex parte deprivation. See, Hecht v. Feldman, 153 Ill. 390, 398,39 N.E. 121 (1894).

In light of these considerations there is no question that the court below was correct that the Illinois Attachment Act is on its face patently and flagrantly unconstitutional. The court's decision is consistent with numerous federal and state courts which have struck down similar statutes on the

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7/ Appellants contend that when the action sounds in tort, the creditor must apply to a judge for the writ of attachment. (Juris. Stat. at 13,17). Appellants, however, misconstrue the Act. The Act provides that the judge shall examine the creditor concerning the cause of action, (not the grounds in the affidavit) and he then endorses upon the affidavit the amount of damages for which the writ shall issue. As the court below recognized this provision is "limited only to the question of potential damage and determination of limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn fact as was the case in Mitchell." In any case, the present attachment was filed as a contract and issued by a clerk without any judicial participation.

8/ In the present case, when plaintiffs appeared with their attorneys on the return date with their counteraffidavit, they were informed that the case had already been continued pursuant to a practice of that court whereby attachment cases were routinely heard thirty days after the return date.

authority of Fuentes, Mitchell, and North Georgia.[9] Since this appeal raises no substantial issues which have not been settled beyond question, further review by this Court is unwarranted.

B. The District Court Did Not Err In Its Decision That The Principles Of Younger v. Harris and Huffman v. Pursue, Ltd. Are Not Applicable To This Suit.

The district court found that Younger v. Harris, 401 U.S. 37 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) did not prevent it from granting plaintiffs the declaratory and injunctive relief requested. The court viewed Huffman as a limited extension of the Younger doctrine of non-interference with state criminal prosecutions to an Ohio civil nuisance proceeding which was in aid of and closely related to criminal statutes. 405 F. Supp. at 760. It found that in contrast to the Ohio nuisance proceeding, the Illinois Attachment Act did not give an exclusive right of action to the state in order to effectuate policies embodied in its criminal laws, but merely provided for a general cause of action for both public and private creditors. The Court reasoned, "it is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding...or that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act they need not be." 405 F. Supp. at 760.

The district court was clearly correct that the principles set forth in Huffman are inapplicable to the case at bar. The Illinois Department of Public Aid, plaintiff in the state court attachment suit, had the authority to bring both a criminal prosecution and a civil collection suit against Mr. and Mrs. Hernandez. It chose not to bring a criminal action but only to proceed with the civil suit. Furthermore, it proceeded by way of attachment, a general creditor remedy not limited to

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9/ See, e.g., Jonnet v. Dollar Savings Bank of New York, 44 U.S. L.W. 2377 (Jan. 27, 1976) F.2d (3rd Cir. 1976); Guzman v. Western State Bank of Devils Lake, 516 F.2d 125 (8th Cir. 1975); Bunton v. First Nat'l Bank of Tampa, 394 F. Supp. 793 (N.D. Fla. (1975)(three-judge court); Douglas Research and Chemical, Inc. v. Solomon, 388 F. Supp. 433 (E.D. Mich. 1975)(three-judge court); Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974); Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974)(three-judge court); Thornton v. Carson, 111 Ariz. 490, 533 P.2d 657 (1975).

actions by the state for recoupment of public aid assistance monies. The federal court injunction prevented the Department from utilizing this patently unconstitutional procedure to facilitate collection of its alleged claim. The injunction did not prevent the Department from instituting a criminal prosecution or proceeding with its civil claim, and it is still free to do so. Nor did the injunction interfere in any way with the ability of the state court to adjudicate the merits of the pending civil claim.[10]

The opinion of the district court is consistent with decisions of other federal courts which have extended Younger principles to non-criminal proceedings. In virtually all these cases the federal courts refused to enjoin proceedings in which a governmental body was an indispensable party and which could fairly be characterized as quasi-criminal.[11] On the other hand, no federal court has extended Younger to proceedings between private parties, such as those authorized by the Illinois Act,

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10/ Prejudgment attachment in Illinois is distinct from and independent of the creditor's chief cause of action. Under the reasoning of Lynch v. Household Finance Corp., 405 U.S. 538, 553-555 (1972) and Fuentes v. Shevin, supra at 71, n.3, attachment under the Illinois Act could be characterized as "extrajudicial" and therefore not a pending state court proceeding to which Younger-Huffman would apply. While the district court rejected this position without explanation, appellees submit that it is another ground for upholding the court's decision that Huffman is inapplicable to the present case.

11/ See, e.g., Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972) (public nuisance proceeding); Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973)(injunction by state to prevent public disorder during school desegregation); Duke v. Texas, 477 F.2d 244 (5th Cir. 1973) (statute authorizing injunction to prevent public disorder where acts enjoined are punishable as misdemeanors); Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2nd Cir. 1975)(disciplinary proceedings against attorney by state bar association); Wallace v. Kern, 520 F.2d 400 (2nd Cir. (state court bail proceedings); McCune v. Frank, 521 F.2d 1152 (2nd Cir. 1975)(county police disciplinary proceedings).

where no more than the private interests of the litigants are at stake.[12/]

The district court also found that the present case falls within one of the exceptions to the Younger-Huffman doctrine since in its view the Illinois Attachment Act was patently and flagrantly violative of the Constitution. As previously noted, the Act conspicuously fails to provide either prior notice and hearing or other procedural safeguards which this Court has now made clear must be present to protect potential debtors from hasty and wrongful seizure of their property. Furthermore, the Act is constitutionally infirm in "whatever manner and against whomever an effort might be made to apply it." See Huffman v. Pursue, Ltd., supra at 671. The Act is so broadly drawn that it could not be interpreted to be limited to those facts or situations which might pass constitutional muster under a more narrowly circumscribed statute.

Even if this Court were to find that the Illinois Act were not so patently unconstitutional as to warrant a federal injunction against the attachment proceedings, appellees submit that the district court's actions were nevertheless appropriate in the present situation. This Court has recognized that the considerations of comity and federalism underlying Younger are inapplicable where litigants are not provided with the "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." Huffman v. Pursue, Ltd., supra at 592, citing Gibson v. Berryhill, 411 U.S. 564, 577 (1973). Here, the very structure of the Illinois Act prevents an attachment

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12/ Federal courts have consistently entertained constitutional challenges to summary creditor remedies where there was a pending state court proceeding. See, e.g., Fuentes v. Shevin, supra; Jonnet v. Dollar Savings Bank of New York, supra; Guzman v. Western State Bank of Devils Lake, supra; Hutchison v. Bank of North Carolina, supra; Douglas Research and Chemical, Inc. v. Solomon, supra; Garcia v. Krausse, supra; Manning v. Palmer, supra; Schneider v. Margossian, 349 F. Supp. 741 (D.Mass. 1972) (three-judge court).

debtor from raising either his federal or state claims until after his property has been attached.

In the instant case the first scheduled hearing on the attachment was forty-four days after the credit union was served with the writ of attachment. Furthermore, had the court found against the plaintiffs at that time on their constitutional claim, under Illinois civil procedure there would have been no right to an interlocutory appeal prior to a final judgment on the merits of the case in chief. Smith v. Hodge, 13 Ill. 2d 197, 148 N.E.2d 793 (1958). Once there is a final judgment the property is either returned to the debtor or delivered to the creditor to satisfy the judgment, thereby rendering an appeal of the constitutional claim an essentially useless act. During this entire period of time the debtor has been deprived of his property without due process of law. In light of this inadequate and cumbersome procedure plaintiffs chose to raise their constitutional claims in the district court where they received an immediate hearing on their request for temporary relief and as a result obtained a release of one-half of their funds.

The district court, then, was clearly correct that Huffman did not prevent it from enjoining the operation of a patently unconstitutional statute. Furthermore, its decision is consistent with those of other federal courts which have extended the principles of Younger and Huffman to civil proceedings, quasi-criminal in nature. Further review by this court is therefore not warranted.

CONCLUSION

For the foregoing reasons appellees submit that this appeal presents no case or controversy and further that this Court

has no jurisdiction of the appeal. In the alternative, appellees believe that the questions presented by this appeal are so unsubstantial as not to warrant plenary consideration by this Court. Appellees therefore respectfully request that this Court dismiss the appeal or, in the alternative, that it affirm the judgment below.

Respectfully submitted,

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